

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RYAN KERWIN : CASE NO. 05-93 ERIE
:
VS. : MAGISTRATE JUDGE SUSAN BAXTER
:
LT. WILLIAM MCCONNELL : DISTRICT JUDGE SEAN MCLAUGHLIN

PLAINTIFF'S RESPONSE TO THE
DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

1. It is denied that plaintiff did not file a grievance on July 23, 2003. (Cmplt. at 4) The defendant has already admitted that plaintiff filed a grievance on July 23, 2003 addressing numerous instances of threatening abuse by various correctional employees employed at S.C.I. Albion in his responsive pleading to plaintiff's complaint. (Def's. Answer at 4)

This prior admission in the defendant's responsive pleading is binding. See, Fed.R.Civ.P. 8(d) (Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading.)

See also, Wyatt vs. Hunt Plywood Co. Inc., 297 F3d 405, 411-412 (5th Cir. 2002) (Defendant's admission in answer to plaintiff's complaint was binding and defendant was estopped from claiming otherwise.) See also, Principle Health Care of Louisiana Inc. vs. Lewer Agency Inc., 38 F3d 240, 244 (5th Cir. 1994) (A motion for summary judgement is not a pleading.)

2. It is denied that plaintiff was interviewed by the defendant with regard to his grievance and abuse allegations on August 27, 2003. This interview was conducted on August 5, 2003 (Cmplt. at 6) and the defendant has already admitted this fact in his responsive pleading to plaintiff's complaint. (Def's.

Answer at 6)

It is admitted that defendant interviewed inmates William Clark and Kenneth Valentine.

Plaintiff does not have sufficient knowledge to admit or deny whether or not defendant interviewed the transfer bus officers.

3. It is denied that the corrections officers did not harass plaintiff and it is denied that they did not know about plaintiff's litigation against S.C.I. Smithfield. **(Cmplt. at 4 and 5 ; Cmplt. Exhibit A)** It is also denied that plaintiff's inmate witness (William Clark) told the defendant that no one harassed plaintiff during the bus transfer. **(Cmplt. at 10 and 11 ; Cmplt. Exhibit E)**

It is admitted that defendant issued plaintiff a misconduct for "lying to an employee" but it is denied that defendant believed plaintiff's allegations were unsubstantiated.

4. It is admitted that defendant issued plaintiff a misconduct (#495879) on August 26, 2003 and that a misconduct hearing was held in relation thereto on September 2, 2003 by a non-defendant hearing examiner named Ivory Barnett.

It is also admitted that plaintiff requested defendant's supposed inmate witness (William Clark) to testify at his misconduct hearing and that Hearing Examiner Barnett denied this request.

It is further admitted that plaintiff was found guilty of the misconduct and sentenced to 30 days cell restriction, effective September 2, 2003.

5. It is admitted that plaintiff was issued another misconduct (#436723) by non-defendant Corrections Officer Rivella on September 22, 2003. However, it is denied that the misconduct had nothing to do with plaintiff's litigation against S.C.I. Smithfield **(Cmplt. at 14 and 15)** and it is denied that plaintiff broke the rules for cell restriction.

It is admitted that Hearing Examiner Barnett presided over the misconduct hearing, that plaintiff was found guilty, and that he was sentenced to an additional 30 days cell restriction to run consecutive to the previously issued cell restriction period.

6. Admitted.

I hereby declare under penalty of perjury that the foregoing facts are true and correct, based upon my personal knowledge and that I am able to competently testify to these facts at trial.

Respectfully submitted,

3/19/06

Date

Ryan Kerwin

Ryan Kerwin

DZ0246

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